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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 438

WOMETCO TELEVISION AND THEATRE COMPANY,

Appellant,

—against—

THE UNITED STATES OF AMERICA and MIAMI BEACH THEATRE CORP.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF

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October 2, 1957

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MOTION TO DISMISS OR AFFIRM

Appellee Miami Beach Theatre Corp. respectfully moves this Court to dismiss the appeal or, in the alternative, to affirm the decision below.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

Statement

Subsequent to the decisions of this Court in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948) and *Loew's Inc.* v. *United States*, 339 U. S. 974 (1950), Loew's Incorporated ("Loew's") and the United States, in February, 1952, entered into a consent judgment. That judgment required sale of designated theatres ("divestiture") and separation, into two different companies, of the

distribution and exhibition activities of Loew's ("divorcement"). It also contained various injunctive provisions.

The divorcement provisions (V) of the decree directed that the theatre assets of Loew's should be conveyed to a new company, referred to as the New Theatre Company, in return for the stock of the New Theatre Company. V(E) provided that so long as Loew's continued to own the stock of the New Theatre Company half of its directors should be appointed by the Court and subject to its direction. Paragraph V(C) reads as follows:

> "Within three years from the date of this judgment Loew's Incorporated shall distribute prorata to its stockholders the capital stock of the New Theatre Company; provided, however, if Loew's shall after two years from the date of this judgment show to the satisfaction of the Court, and the Court shall first find, that it is unable to arrange a division of its present funded debt between it and the New Theatre Company or to procure substantially similar financing in replacement of the present funded debt so as to accomplish a division of such debt in a manner which will permit such companies to do business with a reasonably prudent financial position, Loew's Incorporated may retain the stock of the New Theatre Company until a division or refinancing to accomplish a division of its present funded debt in a reasonably prudent manner between Loew's Incorporated and the New Theatre Company can be arranged, but such division or refinancing shall in any event be made no later than five years from the date of this judgment; and Loew's Incorporated shall distribute the stock of the New Theatre Company prorata among its stockholders within thirty (30) days after a division or refinancing of its present funded debt is effectuated."

The time to arrange a division of the debt has been extended by order of Judge Palmieri dated February 6, 1957.*

A footnote to III(7) of the consent judgment provided that divorcement shall not be deemed incomplete by virtue of retention of the New Theatre Company stock by Loew's pending efforts to arrange a division of the debt.

III(7) of the decree prohibited (except in certain circumstances not here material) acquisitions of theatres by

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*Judge Palmieri had occasion to comment upon the circumstances which impelled a further extension of the deadline during the hearing on the orders involved on this appeal:

"MR. STEIN: . . .

"But, in addition to that provision, there was also a provision that Loew's, Inc., within five years, would get rid of any beneficial interest it had in the Theatre Corporation.

"As of this day, more than five years later, it has not gotten rid of that interest and, furthermore, by an order entered by your Honor on February 4, 1957, that provision had been waived until further order of the court.

"Now, what does that mean?

"THE COURT: That means that we have got a problem that can't be solved yet. There is a mere matter of about $35 million of a funded indebtedness due to about eight insurance companies, and, if you had the wisdom of Solomon, you couldn't have solved it so far.

"MR. STEIN: I am not attempting to, sir.

"THE COURT: It is a very vexatious, difficult and troublesome matter which I have had to impose upon a number of people to come in and help me as consultants and which we have not yet found a solution to, but we will as rapidly as it is possible to do so.

"When you talk about waiver, don't do so quite so flippantly because nothing has been waived. These people have been held to toe the line very closely, but unfortunately it hasn't been easy to solve but it will be solved as soon as it can be.

"If you know anybody that would like to lend $35 million for 3 per cent interest I would like to know about it, because then we can solve it."

(Transcript of hearing June 27, 1957, pp. 15-17.)

Appellant has stated in its jurisdictional statement that:

". . . Appellant is not seeking to question the order which so extended the time of Loew's Incorporated for divestiture. . . ." (Juris. St., p. 17)

Loew's prior to accomplishment of divorcement and divestiture, and authorized their acquisition after the accomplishment of divorcement and divestiture only in those cases where "the New Theatre Company shall show to the satisfaction of the Court, and the Court shall first find, that the acquisition will not unduly restrain competition."

X(1) of the decree provided as follows:

> "1. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this consent judgment and no others to apply to the Court at any time for such orders or direction as may be necessary or appropriate for the construction, modification, or carrying out of the same and for the enforcement of compliance therewith and for the punishment of violations thereof, or for other or further relief."

On September 1, 1954, divorcement as defined for purposes of III(7) of the consent judgment was carried out; as of that date everything was accomplished except division of the debt and final distribution of the stock. As of that date the New Theatre Company became empowered, with permission of the Court, to acquire new theatres.

In June of 1957 Miami Beach Theatre Corp., a Loew's theatre-owning subsidiary, which will, when division of the debt is accomplished, become a subsidiary of the New Theatre Company, moved for an order authorizing it to acquire and operate a theatre to be constructed about 10 miles north of Miami Beach, Florida. The moving papers show—without contradiction—that the New Theatre Company and its affiliates presently are interested in only two theatres in Florida, one in South Miami, 24 miles away, and the other in Jacksonville, 400 miles away. Those moving papers also generally describe the nine theatres that are physically closest to the site of the proposed acquisition, and the eight first-run theatres in downtown Miami. Information concerning theatres in the area is shown graphically by

two maps that were submitted by Miami Beach Theatre Corp.

The United States did not oppose the application. Its counsel appeared on the return of the motion and advised the Court that "it is the view of the Government that the acquisition of this theatre by Loew's Theatres will not unduly restrain competition". (Pages 11-12 transcript of hearing of June 27 and 28.)

Wometco Television and Theatre Company ("Wometco"), a circuit which owns twenty-three motion picture theatres in the Miami area, sought leave to intervene and oppose the motion. The position taken by Wometco in the proceedings below may be summarized as follows:

1. If the acquisition is approved, Wometco will be injured because it has a theatre nearby the proposed site of the new theatre.

2. The Government will not adequately represent the interest of Wometco (see Wolfson affidavit, pages 1-2). Analysis of prior applications by the New Theatre Company shows that the Government has not conscientiously investigated the problems presented by the acquisitions for which approval was sought, and that it has neither the ability nor the desire to protect the interests of competing exhibitors.

3. If the application is granted, Loew's will unlawfully favor the new theatre, and discriminate against Wometco; this is apparent from the fact that another theatre in the Miami area, acquired with permission of the Court in 1955 (over Wometco's opposition), has been given preferential treatment by Loew's.*

*The answering affidavit denies this. It asserts that the other Miami theatre—the Riviera—"has been required to bid competitively for product and has at no time been shown any favoritism whatsoever by any distributor, while Wometco has been favored because of its dominant position and buying power in the area. Wometco has on numerous occasions obtained product without bidding competitively, all to the detriment of the Riviera Theatre."

4. Wometco will be unable, once permission to make the acquisition is granted, to secure an injunction to protect itself against such violations of law.

Judge Palmieri denied Wometco's motion to intervene, but did accord to it the right to be heard as amicus curiae. The order so holding was filed on July 1, 1957. A hearing was held at which counsel for Wometco was heard in opposition to the motion of Miami Beach Theatre Corp. On July 10 that motion was granted and leave was given to acquire the theatre; that order was filed on July 11. On July 24 Wometco served a notice of appeal from both orders.

Argument

This is the sixth time that this Court has had occasion to pass upon a decision of the District Court denying the application of a private party to intervene in the Government antitrust suit against the motion picture companies. In the five prior instances this Court sustained the action below either by dismissing the would be intervenor's appeal or by affirming the decision below. *St. Louis Amusement Co.* v. *United States*, 326 U. S. 680 (1945); *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 177 (1948); *Ball, Trustee* v. *United States*, 338 U. S. 802 (1949); *Partmar Corp.* v. *United States*, 338 U. S. 804 (1949); *Sutphen Estates Inc.* v. *United States*, 342 U. S. 19 (1951). Nothing involved in this appeal warrants any different treatment from that accorded the five prior ones.

Intervention is regulated by Rule 24 of the Federal Rules of Civil Procedure, which reads as follows:

RULE 24.

INTERVENTION.

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an

action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or of an officer thereof.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) *Procedure.* A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney Gen-

eral of the United States as provided in Title 28, U. S. C. § 2403.

POINT I

THE ORDER DENYING LEAVE TO INTERVENE IS NOT APPEALABLE AND THE APPEAL SHOULD BE DISMISSED.

It is well settled by a series of cases that a decision denying leave to intervene is appealable in two cases only: (a) where intervention as of right is granted under the Federal Rules; and (b) where (i) the Federal Rules provide for permissive intervention and (ii) the Court below committed a breach of discretion in denying permission to intervene.* Neither circumstance is present here.

A. Wometco was not entitled to intervene as of right.

Wometco relied upon (2) and (3) of Rule 24(a) as affording it a right to intervene. (3) is plainly inapplicable: no property *in custodia legis* is here involved. (2) is equally inapplicable because Wometco will not be bound by the decision on the instant application; and Wometco has no interests to be protected in connection with that application.

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*"Our jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the applicant's right to intervene. If the right is absolute, the order is appealable and we may judge it on its merits. But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable and we lack power to review it. In other words, our jurisdiction is identified by the necessary incidents of the right to intervene in each particular instance. . . ." *Railroad Trainmen* v. *B & O. R. Co.*, 331 U. S. 519, 524-5 (1947). See also *Allen Co.* v. *Cash Register Co.*, 322 U. S. 137 (1944); *Sutphen Estates* v. *United States*, 342 U. S. 19 (1951); *cf. Missouri-Kansas Pipeline Co.* v. *United States*, 312 U. S. 502, 506 (1941) ("Plainly enough, the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the nisi prius court.")

Implicit throughout Wometco's position is the assumption that the purpose of the *Paramount* case and the decrees against the defendants in that case was to protect the private interests of Wometco. But the decree itself contradicts that assumption. The very clause pursuant to which permission was sought below requires a showing that the acquisition will not unduly restrain *competition*; it does not require a showing that there shall be no harmful effect upon *competitors*. It was the public, not a private, interest that the decree sought to protect. Witness Section X, which authorizes the parties to the consent judgment *and no others* to make application to the Court for appropriate relief.

The situation here presented contrasts with that involved in *Missouri-Kansas Pipeline Co.* v. *U. S.*, 312 U. S. 502 (1941), in which a consent decree contained a specific provision designed to protect a private party.* This Court's decision in that case is based upon the proposition that "where the enforcement of a public law also demands distinct safeguarding of private interests *by giving them a formal status in the decree*, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the Court's discretion." (Page 506; emphasis added.)

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*The *Pipeline* case arose out of an antitrust suit against Columbia Gas in which it was asserted that Columbia had acquired financial control of the Panhandle Company in order to prevent the latter from competing in Columbia's territory. The case was settled by a consent decree which contained provisions preventing interference with Panhandle and granting to Panhandle the right to intervene in the action and secure injunctive relief in the event that its operations were hindered. Later the Department sought an amendment of the decree. Panhandle sought to intervene in the proceedings. Its application was denied. It thereupon appealed to the Supreme Court. The Supreme Court reversed for the reason indicated in the text.

B. The Court did not breach its discretion in denying permissive intervention.

1. Wometco's failure to follow the procedure directed by Rule 24(c) would suffice to justify, if not to compel, the decision below. The Rule requires that the motion "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought". The Jurisdictional Statement speaks of a "contemplated lawsuit" (p. 6); but Wometco nowhere, either here or in the Court below, sets forth the nature of the claim that would be presented in that suit. That failure to follow the required procedure made it impossible for the Court to find that Wometco's claim and the acquisition application involved common questions. As will be shown in the next paragraph, the required proposed pleading, had it been prepared, would have demonstrated the absence of a common question.

2. The Court below was not authorized to permit intervention under Rule 24(b) because Wometco actually has no "claim or defense" that involves the questions presented in the Miami Beach Theatre Corp. application. While Wometco, despite the requirements of the Rule, omitted to submit a pleading setting forth the nature of its "contemplated lawsuit", it is apparent from the moving papers that Wometco's claim would necessarily involve a question considerably different from that presented upon the application below. The issue involved in the "contemplated action" would be, not whether the acquisition was one which should be excepted from the prohibitions of the decree—Wometco has no protectible private rights under the decree—but the considerably different issue as to whether the acquisition would run afoul of the far lesser strictures imposed by the antitrust laws.

3. But if the Court had the power, in the exercise of its discretion, to authorize intervention here, its denial of intervention involves no breach of discretion. The circumstances favoring Wometco's intervention are no stronger than those urged by would-be interveners in the five prior instances in the motion picture litigation in which denial of intervention was approved by this Court, or the other prior instances where intervention was denied and no appeal taken.*

POINT II

THE APPEAL FROM THE ORDER AUTHORIZING THE ACQUISITION SHOULD BE DISMISSED.

Dismissal of the appeal from the order denying intervention operates to confirm Wometco's lack of standing to take an appeal from the order sanctioning acquisition of a new theatre. The appeal from that order should therefore be dismissed as well.

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*According to the opinion of Judge Sugarman on a prior similar motion in this action, 136 F. Supp. 13[illegible]4 (1955), there had been, as of December 19, 1955, nine prior unsuccessful attempts to intervene in the *Paramount* case. There have been two additional unsuccessful intervention attempts (not including Wometco's attempt) since the date of Judge Palmieri's decision.

Of interest are the following comments of Judge Sugarman during the hearing on December 19, 1955, pp. 75-6:

> "THE COURT: In other words, you could come in now and say in every single case, where any theatre exhibiting corporation, that was splintered off as a result of the Paramount decree, came in and asked for permission to obtain an interest or an entire theatre, then I take it that the competing theatres, and I have no illusions about it, they are worrying about their own pocketbooks, they aren't worrying about the public——
>
> "MR. STEIN: No question about it.
>
> "THE COURT: But they would all come running in and want the Court to determine in anticipation what run this newly-acquired interest is to get, and I don't think that is the province of the Court. I don't think it was the intention of the Paramount decree to put the Court into the business of operating theatres and that, in essence, is what we are doing."

If this Court were to pass upon the decision below authorizing the acquisition, it is clear that its decision would necessarily be an affirmance.

As Wometco itself apparently recognizes by citing the cases on the bottom half of page 3 of the Jurisdictional Statement, the only question is whether there was substantial evidence to support the decision below. Substantial evidence there was.

Indeed, the evidence presented shows that competition would benefit, rather than lose, by the granting of the application. The record shows that the New Theatre Company has a negligible position in the exhibition field in Florida, and that the Miami area is dominated by two large theatre circuits, one of whom is Wometco.

The essence of Wometco's opposition is that Loew's will conspire with the new theatre, in violation of the decree, to prefer it over its competitors. As Judge Palmieri pointed out on the hearing (p. 24), were Loew's to do so it would be in contempt of the provisions of the decree.* The Jurisdictional Statement's expressed fear of the use of the "long purse" by the new theatre is incongruous when uttered by the dominant circuit in the Miami area. It should be recalled that the "long purse" of the new theatre will be controlled by a board of directors, half of whose members are appointed by the Court. The Court below would have been justified in suspecting that Wometco's sole concern about "long purses" was the fear its own might be shortened.

All the important aspects of the problem presented on Miami Beach Theatre Corp.'s application were effectively decided by express provisions of the decree itself. Thus,

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*II(8) of the decree restrains Loew's "From licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others."

the decree itself establishes that the New Theatre Company is not to be generally prohibited from engaging in exhibition or from acquiring new theatres.* And the decree itself provides that the retention of the New Theatre Company stock by Loew's pending division of the debt should not operate to prevent approval of new acquisitions. It is true that the original decree contemplated that retention of the stock should not last longer than two years—until February of this year. However, the Court has, for good and sufficient reason, extended the two-year period, and Wometco asserts that it does not question that extension (Juris. St., p. 17). If there was ever a situation in which acquisition of an additional theatre by Loew's was to be approved—and clearly the decree contemplated that such acquisitions should be approved at least in some circumstances—this is such a situation.

Respectfully submitted,

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*It might be inquired in what manner the operation of the new theatre in Miami will affect competition more adversely than the operation by the New Theatre Company of any of the other theatres which the decree allowed it to retain.